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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC VASQUEZ ORTIZ, Defendant and Appellant.	G056093 (Super. Ct. No. 11CF0862) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed in part, reversed in part, and remanded with directions.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel, Tami Hennick, and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Eric Vasquez Ortiz of second degree murder after Ortiz shot and killed an individual standing next to a rival gang member. Ortiz appeals his conviction, claiming the trial court erred by: (1) improperly imposing a 10-year gang enhancement; (2) denying his request to transfer the matter to juvenile court; (3) committing instructional error concerning the definition of primary activities for the gang enhancement; (4) improperly commenting on a witness's Fifth Amendment privilege; and (5) denying his motion for a new trial based on juror misconduct. The Attorney General concedes error as to the first two issues. We agree the court improperly imposed the gang enhancement and should have granted Ortiz's request to transfer the matter to juvenile court. We therefore conditionally reverse and remand those issues for further proceedings consistent with this opinion. We also remand the matter to the trial court to consider Ortiz's request to unseal the redacted juror misconduct materials for public view. In all other respects, we affirm the judgment.

FACTS

I. *The Underlying Murder*

In 2006, Ortiz was a 17-year-old member of the Brook Street gang and former associate of the "CLS" crew. In October 2006, Emmett Adame was shot in the back and killed while standing in front of his house talking with gang member Benjamin Lopez. Lopez was a member of the Alley Boys gang, a rival gang to Brook Street. Thirteen 9mm casings were discovered in the street near Adame's home. No DNA or fingerprints were recovered on the casings.

II. *Procedural Background*

An information charged Ortiz with murder (Pen. Code, § 187,[1] subd. (a); count 1) and attempted murder (§ 664; count 2). It alleged a gang principal fired a gun to commit the crimes and that the crimes were gang-related. (§§ 12022.53, subd. (c), (d),

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

(e)(1), 186.22, subds. (b)(1)(C).) The information further set forth a gang special circumstance on count 1. (§ 190.2, subd. (a)(22).)

At the first trial in 2014, the jury convicted Ortiz, but the conviction was overturned based on the use of jail informants. (See *People v. Dekraai* (2016) 5 Cal.App.5th 1110.) In 2016, Ortiz's second trial ended in a hung jury. He was then retried a third time.

III. *The Underlying Trial*

A. *Codefendants' Testimony*

Codefendants Victor Lagunas and Sergio Cabezas were members of The Public Vandals (TPV) gang. Lagunas and Cabezas were described as short and chubby, while Ortiz was labeled tall and skinny. The Brook Street and TPV gangs were allies who shared the Alley Boys gang as a common enemy.

1. *Lagunas's Testimony*

Ortiz requested an Evidence Code section 402 hearing in advance of Lagunas's testimony. "[T]he People intend to call . . . Lagunas to the stand. And I'm asking for a [Evidence Code section] 402 hearing to determine if in fact he's going to testify to determine if he's going to refuse to testify and to have him admonished outside the presence of the jury." Ortiz also moved for a limiting instruction, in the event Lagunas refused to testify. The trial court agreed a limiting instruction could be drafted and given at the end of the trial.

At trial, the prosecution asked Lagunas whether he saw Ortiz shoot Adame, but Lagunas refused to testify, attempting to invoke his Fifth Amendment right. The court stated, "You've been found guilty in this case. Your appeal periods have all run, so you can't incriminate yourself in this case. You've already been found guilty, so you don't have a [Fifth] Amendment right against self-incrimination as far as this case." Lagunas refused to testify, and the court held him in contempt.

Following this exchange, the trial court instructed the jury Lagunas's refusal to testify could only be considered to support the gang expert's testimony. Ortiz moved for a mistrial, out of the presence of the jury, based on the court's statement Lagunas had already "been found guilty." The court denied the motion. It then offered to instruct the jury to not consider "the fact that . . . Lagunas was found guilty in this case." Ortiz declined the offer, contending such an instruction would "highlight" any arguable prejudicial issue.

2. *Cabezas's Testimony*

Cabezas was arrested for the underlying shooting in June 2011 while he was in custody on another matter. Cabezas initially denied involvement. He later agreed to testify for the prosecution in exchange for a plea.

Cabezas testified Lagunas was his protégé in the gang. On the day of the shooting, Cabezas and Lagunas were driving around Santa Ana. Lagunas had a .357 revolver, and Cabezas had a 9mm semi-automatic. Lagunas saw Ortiz on the street and told Cabezas to pick him up. Cabezas had never met Ortiz before. The three went driving in rival gang territory "looking for enemies." Cabezas spotted Lopez. Cabezas parked the car and the three discussed who was going to get out and shoot. Cabezas was worried about his car, so he gave Ortiz his gun and hung back as the getaway driver while the other two got out.

Cabezas further testified Ortiz and Lagunas walked to the corner and opened fire on Lopez. The two ran back to the car, and Cabezas drove them away. Ortiz was dropped off at the intersection of Shelton and Highland, but did not mention seeing his girlfriend.

B. *Ortiz's Girlfriend's Testimony and Statements to Police*

Ana Pulido was dating Ortiz at the time of the shooting. Pulido testified Cabezas and Lagunas drove by on the day of the shooting in Cabezas's car looking for Ortiz. When they found Ortiz he got in their car and left. About 10 to 15 minutes later,

Pulido heard gunfire. Pulido went to look for Ortiz on her bicycle, but she could not find him until about 30 minutes to an hour later. Pulido testified Ortiz never told her he was a shooter.

In 2006, Pulido told law enforcement she found Ortiz at his house sometime after the shooting. At another interview in 2007, Pulido said Ortiz went looking for her after the shooting. In the same interview, Pulido said she had never seen Ortiz with a gun because he was a tagger. In 2007, Pulido and Ortiz had broken up and Pulido was pregnant with another man's child. She told police, "[I] couldn't care less about [Ortiz]." Pulido also told the police sometime after the shooting, Ortiz told her, '"we got off"' and instructed Pulido not to say anything.

C. *S.V.'s and N.M.'s Testimony*

S.V. was unavailable, and therefore his testimony from the 2016 trial was read into the record. S.V. testified Ortiz tagged his truck in 2004 with black spray painted letters spelling, "Brook Street." S.V. made him clean it up. On the day of the shooting, S.V. testified he saw Ortiz walking by and asked him how he was doing. While they were talking, they heard gunshots.

In April 2011, S.V. read in the newspaper that Ortiz was connected with the shooting. S.V. testified he went to the preliminary hearing and discovered Ortiz was being charged with murder, so he told Ortiz's trial counsel's investigator what he knew.

S.V.'s wife N.M. stated that on the night of the shooting, she went outside to check on her children and saw Ortiz and S.V. talking. After going inside her house, N.M. came back outside when she heard sirens go by. S.V. asked N.M. if she heard the gunshots.

D. *Gang Expert's Testimony*

Prosecution gang expert Santa Ana police officer Julian Rodriguez opined the crime was done for the benefit of, at the direction of, and in association with the Brook Street and TPV gangs. Rodriguez explained that gang culture promoted trust and

unity amongst gang members, including that they would not testify against one another. Rodriguez testified Cabezas was an aspiring shot-caller in TPV. Rodriguez also deemed the scenario described by S.V. improbable. He opined S.V. would not be friendly with Ortiz after Ortiz tagged his truck.

E. *Other Witnesses' Testimony and Statements*

Mariano Ortiz[2] was watching television in bed when the shooting occurred. Mariano looked outside to see two young Hispanic men running side by side on the sidewalk in front of his house. Mariano initially described the two as "gorditos," meaning chubby guys, plural. At trial, Mariano said he could not recall whether the second subject was thin or fat, but he was thinner than the first.

Efrain Gutierrez was working on his door when he heard the gunshots. Gutierrez saw two teenagers who he believed to be Hispanic, running.

Jonathan Alvarado was playing video games the night of the homicide. Alvarado previously testified he heard gunshots and looked out the window. He saw one man sitting in a black Camry and another man running to it. The runner had difficulty getting inside the car. He described the men as Hispanic with shaved heads.

IV. *Jury Instructions, Verdict, Sentencing, and Posttrial Issues*

The trial court instructed the jury as to the gang enhancement, defining a criminal street gang as follows: "A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of illegal[] possession of firearms, sales of narcotics, and felony assaults; [¶] AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. [¶] In order to qualify as a primary activity, the crime must be one of the group's chief or principal

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[2] Because the witness has the same last name as the defendant, we refer to him by his first name only. We intend no disrespect.

activities rather than an occasional act committed by one or more persons who happen to be members of the group." The court and counsel discussed the proposed jury instructions. Ortiz never objected to the language of this instruction.

The jury convicted Ortiz of the lesser-included charge of second degree murder as to count 1 and found the gang allegation to be true. The jurors found the gun allegation not true. The trial court sentenced Ortiz to a term of 15 years to life for count 1 plus a 10-year gang enhancement.

In March 2018, prior to sentencing, Ortiz moved to remand the matter back to juvenile court based on the "Public Safety and Rehabilitation Act of 2016" (Proposition 57). The prosecution argued Ortiz was no longer within the jurisdiction of the juvenile court based on his current age–27. Ortiz contended he was under the age of 18 when the crime here occurred, and the procedural history of this case (three separate trials) is what caused him to be in his mid-twenties at the time of sentencing. The trial court denied the motion. It determined, "based on the fact that I don't believe the [j]uvenile [c]ourt has jurisdiction at this point, I'm going to deny the motion to transfer him back to [j]uvenile [c]ourt."

V. *Juror Misconduct*

After the verdict, juror no. 173 testified in a sealed hearing. Juror no. 173 testified she was aware of the trial court's admonitions to not conduct any research of this case during the trial. After the verdicts were read, defense investigator Nicole Busse approached her in the hallway, and juror no. 173 provided the investigator with her phone number. The two met shortly thereafter. Juror no. 173 affirmed she was truthful with the investigator.

Juror no. 173 testified she lived in the neighborhood where the murder occurred for about five and one-half years, but moved away the day before she reported for jury duty in this case. While sitting as a juror, she learned the crime occurred in her

old neighborhood. While watching videos about people related to S.V. at trial, juror no. 173 recognized D.O., a man who was an associate of S.V. At one point, juror no. 173 bumped into someone from her old neighborhood and asked this person how D.O. was related to S.V. Juror no. 173 learned D.O. used to sell drugs in the neighborhood. She heard S.V. had "big question marks," but claimed she did not know if the person told her S.V. was the head of a gang, or just that he was involved with a gang. Juror no. 173 believed D.O. and S.V. were affiliated with "gangs or drugs or something."

During the hearing, juror no. 173 stated she did not seek out the information concerning D.O. and S.V., rather the information came to her. She also testified she never spoke to any other jurors about this information. Juror no. 173 testified she had previously met with Busse, who had prepared a declaration for her to sign, and juror no. 173 marked where she did not agree with particular statements and ultimately refused to sign the declaration. Juror no. 173 testified she told Busse that she did not want to get in trouble for speaking to someone about the witnesses during trial. Finally, juror no. 173 testified she fell on her head a month prior to testifying and she believed that may be affecting her memory.

Busse also testified and submitted her own declaration. Busse stated juror no. 173 did not want to sign the prepared declaration because she did not want to get in trouble for speaking to someone about the witnesses while she was a sitting juror in this case. Within this declaration, juror no. 173 purportedly stated she learned S.V. was the head of a gang, and involved with the Mexican Mafia. That said, juror no. 173 disputed the phrase, "I conducted my own research," claiming that could not be in the declaration because it is "'against the law' to contact someone about the case in the middle of trial." Juror no. 173 affirmed she knew such contact was a violation of the trial court's order. The unsigned declaration prepared for juror no. 173 stated, "I did not share any of the information I obtained regarding [S.V.] and [D.O.] with other jurors and do not believe the information I obtained affected my vote."

Busse's declaration reported juror no. 173 stated the content of this disputed declaration was accurate, but she refused to sign it. Juror no. 173 informed Busse that if she was asked when she spoke to someone outside the case about D.O. and S.V., she was going to say that it occurred when the trial was over. Finally, Busse testified she contacted the other jurors in this case and none of them reported juror no. 173 shared any information about S.V. during their deliberations.

Following his conviction, Ortiz moved to unseal juror identifying information and for a new trial. The trial court released juror identifying information to Ortiz's trial counsel to conduct an investigation into potential juror misconduct. The court ultimately denied Ortiz's motion for a new trial based on juror misconduct. The trial court concluded, "I don't believe [information received by a juror] was substantially prejudicial. So I don't think there's substantial prejudice or substantial likelihood of juror bias in this case. So based on -- we all agree there was juror misconduct. But I don't think there is a substantial likelihood that [the juror] was actually biased. I'll deny the motion based on the allegation."

DISCUSSION

I. *10-Year Gang Enhancement as to Count 1*

Ortiz contends, and the Attorney General concedes, the trial court erred by applying a 10-year gang enhancement as to count 1. In sentencing Ortiz, the court stated: "The jury found [Ortiz] guilty of the lesser offense to [c]ount 1, second degree murder, and it also found the enhancement under [section] 186.22 [subdivision] (b)(1) to be true, as applied to a violent felony. That adds ten years. [¶] So I will sentence [Ortiz] as follows: [¶] On [c]ount 1, it would be 15 years to life, that is the sentence for second degree murder plus [10] years for the enhancement[.]" We agree this was error.

Section 186.22, subdivision (b), sets forth alternative ways to punish defendants who commit crimes for the benefit of a criminal street gang. Pursuant to section 186.22, subdivision (b)(5), the 15-year minimum parole eligibility requirement

should be imposed instead of the sentence enhancement if the defendant is convicted "of a felony punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 (*Lopez I*).)

In *Lopez I*, the California Supreme Court addressed whether a gang-related first degree murder, punishable by 25 years to life, carried an additional 10-year enhancement under section 186.22, subdivision (b)(1)(C), or, alternatively, a minimum parole eligibility term of 15 years under section 186.22, subdivision (b)(5). (*Lopez I, supra*, 34 Cal.4th at p. 1004.) The *Lopez I* court determined that since first degree murder is a felony punishable by life imprisonment, the murder count was not subject to the 10-year enhancement under section 186.22, subdivision (b)(1)(C). (*Ibid.*) Rather, it was subject to the provision that provides the defendant "shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subd. (b)(5).)

Ortiz's conviction was a "felony punishable by imprisonment in the state prison for life" for purposes of section 186.22, subdivision (b)(5). Ortiz's sentence must be modified to strike the 10-year enhancement and to instead impose the 15 years to life minimum parole eligibility.

II. *Proposition 57*

Ortiz claims the trial court erred by determining it had no jurisdiction over Ortiz based on his age at the time of sentencing. The Attorney General concedes Proposition 57 applies retroactively to Ortiz. We agree Ortiz is entitled to the retroactive benefit of Proposition 57.

In *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, the California Supreme Court concluded Proposition 57 was retroactive. The court held Proposition 57 "applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Id*. at pp. 303-304.)

Ortiz's judgment was not final when Proposition 57 was enacted in 2016, as he was sentenced in 2018. Proposition 57's requirements apply retroactively to Ortiz.

The trial court erred by denying Ortiz's motion for a transfer hearing remand. We conditionally reverse the judgment and remand the matter to the juvenile court with directions to conduct a transfer hearing pursuant to Welfare and Institutions Code section 707, subdivision (a).

III. *Jury Instruction Concerning Primary Activities of the Gang*

Ortiz argues the trial court erred when it instructed the jury as to the primary activities of the Brook Street gang because the definitions of "possession of illegal firearms" and "sales of narcotics" were overly inclusive. The trial court defined a gang as a group that, "has, as one or more of its primary activities, the commission of illegal[] possession of firearms, sales of narcotics, and felony assaults." We find no error.

Our task is to determine whether the instruction was proper and if not, whether the error was harmless. (*People v. Flood* (1998) 18 Cal.4th 470, 482.) We consider """"whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.'""" (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) We also consider the instructions as a whole and "'assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" (*Ibid*.)

To establish a gang participation crime or a gang benefit enhancement, the prosecution must prove the existence of a criminal street gang. (CALCRIM Nos. 1400, 1401.) Section 186.22, subdivision (f), states a criminal street gang is one whose primary activities involve the commission of certain enumerated crimes. These enumerated crimes are set forth in section 186.22, subdivision (e), and include, assault with a deadly weapon or by means of force likely to produce great bodily injury, sales of controlled substances, and possession of firearms capable of being concealed upon the person. The commission of one or more of the statutorily enumerated crimes must be one of the gang's "'chief'" or "'principal'" undertakings to qualify as "'primary activities.'" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) The California Supreme Court

has held that the "primary activities" element might be satisfied by expert testimony that the defendant's gang "was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.]" (*Id*. at p. 324.)

Ortiz contends the instructional definition of primary activities misstated the law. He claims while section 186.22, subdivision (e), includes certain possessions of firearms, it does not include all illegal possessions of firearms. Similarly, although the list includes the sale of certain controlled substances, it does not include all sales of narcotics. Finally, the list includes aggravated assaults, but does not include all felonious assaults. Ortiz argues the court's over inclusive description of the crimes eligible for the primary activities element incorrectly described what was required for a criminal street gang finding.

Gang expert Rodriguez testified the primary activities for the Brook Street gang were narcotics sales, illegal firearms possession, and assault with a deadly weapon. For TPV, Rodriguez opined its primary activities were vandalism, illegal firearms possession, and assault with a firearm. This evidence was uncontested at trial. Given Rodriguez's specific reference to the gang's primary activities as narcotics sales and illegal firearms possession, it is illogical to think Rodriguez could have been referring to narcotic sales or illegal firearm possession permitted under section 186.22, subdivision (e). Due to Rodriguez's gang experience, it is a fair inference he was referring to "[t]he sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in [s]ections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code" and "[p]ossession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of [s]ection 12101 until January 1, 2012, and, on or after that date, [s]ection 29610," as enumerated in section 186.22, subdivision (e). Furthermore, given the presumption jurors are intelligent, in addition to the fact the evidence of the gang's

primary activities was not challenged at trial, there is no reasonable likelihood the jury applied the challenged instruction in the manner Ortiz suggests. We find no error.

However, even if we presume error, it was harmless. The instruction also included "felony assaults" as an enumerated primary activity. At trial, Rodriguez testified the primary activities of Brook Street included "assaults with deadly weapons." The jury had evidence to make a finding that assault with a deadly weapon satisfied the primary activity requirement. Accordingly, any presumed error was harmless.

IV. *Trial Court's Comment Regarding Lagunas's Conviction*

Ortiz contends he was prejudiced by the trial court's statements in the course of explaining to Lagunas that he did not have a Fifth Amendment privilege. We disagree.

"Once a court determines a witness has a valid Fifth Amendment right not to testify, it is, of course, improper to require him to invoke the privilege in front of a jury; such a procedure encourages inappropriate speculation on the part of jurors about the reasons for the invocation. An adverse inference, damaging to the defense, may be drawn by jurors despite the possibility the assertion of privilege may be based upon reasons unrelated to guilt. These points are well established by existing case law. [Citation.] But where a witness has no constitutional or statutory right to refuse to testify, a different analysis applies. Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony." (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554 (*Lopez II*).) We review the court's statements about Lagunas's conviction under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Under this standard, a case should be reversed only when it is reasonably probable that a result more favorable would have been reached in the absence of the error. (*Ibid*.)

We find *Lopez II* instructive. There, the prosecution called a gang member to describe a gang-related assault he had committed before the charged offense to establish a pattern of criminal gang activity for purposes of section 186.22, subdivision

(e). (*Lopez*, *supra*, 71 Cal.App.4th at p. 1553.) He had pleaded guilty and no longer had a Fifth Amendment privilege, but when he took the stand, he refused to answer any questions. (*Id.* at p. 1553.) Another panel of this court determined "the jury was entitled to consider [the witness's] improper claim of privilege against him as evidence relevant to demonstrate exactly what the gang expert had opined: that gang members act as a unit to advance the cause of the gang and to protect their members." (*Id.* at pp. 1555-1556.)

Here, like in *Lopez II*, the trial court correctly identified Lagunas had no valid Fifth Amendment right not to testify since he had already been found guilty and his period to appeal had run. The court permitted the prosecution to call Lagunas as a witness. Lagunas's subsequent refusal to testify was relevant to show the gang culture's rule against snitching. Thus, the jury was "*entitled* to draw a negative inference" from Lagunas's refusal to testify. (*Lopez II, supra*, 71 Cal.App.4th at p. 1554.)

Furthermore, assuming without deciding the trial court's comment, "[y]ou've already been found guilty" in this case, was made in error, Ortiz fails to demonstrate prejudice. The court explained to Lagunas that he no longer maintained a Fifth Amendment privilege, and his refusal to testify was relevant to the gang expert's opinion concerning gang culture. Even absent evidence Lagunas had been found guilty, the evidence against Ortiz was significant. By returning a guilty verdict, the jury apparently accepted Cabezas's account of the evening. Cabezas testified he was the getaway driver for the planned gang shooting. He stated Ortiz and Lagunas, both armed, walked toward Adame's house. Cabezas heard several gunshots in a quick succession, followed by Ortiz and Lagunas running back to the getaway car. Pulido also informed police she observed Ortiz leave with two men (one of which was Cabezas) and minutes later heard gunshots. Shortly after the murder, Ortiz confessed to Pulido that he was involved in the shooting. Ortiz also admitted to police he was with Cabezas that evening. Finally, Rodriguez opined the shooting was done to promote, further, and assist both the Brook Street and TPV gangs.

What is more, Ortiz concedes the testimony of his alibi witness, S.V., was "problematic." S.V. was unavailable, and therefore his testimony from a previous trial was read into the record. The prosecution's rebuttal evidence demonstrated S.V. was a gang member dedicated to helping other gang members, calling into question the credibility of his alibi for Ortiz. In sum, even absent evidence of Lagunas's conviction in this case, a result more favorable to Ortiz would not have been reached. As such, the trial court's reference to Lagunas's conviction did not infringe on Ortiz's constitutional rights to due process and a fair trial because it was "not reasonably probable that the error affected the outcome of the trial." (*People v. Harris* (2005) 37 Cal.4th 310, 336.)

V. *Juror Misconduct*

Ortiz contends the trial court erred by denying his motion for new trial, citing juror misconduct. Specifically, he asserts the information obtained by juror no. 173 about S.V. being part of a gang was not presented at trial and the information was prejudicial. We disagree.

"We review the trial court's denial of a motion for new trial for abuse of discretion. [Citation.] In doing so, "'[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence."' [Citation.] (*People v. Bonilla* (2018) 29 Cal.App.5th 649, 659.) The verdict will be set aside only if there appears to be a substantial likelihood of juror bias. (*In re Carpenter* (1995) 9 Cal.4th 634, 654 (*Carpenter*) ["the criminal justice system must not be rendered impotent in quest of an ever-elusive perfection"].) "In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict." (*Ibid*.)

Here, a review of the entire record fails to reveal a substantial likelihood the juror was impermissibly influenced by outside information. "Without minimizing the seriousness of the misconduct here, and '"without detracting from the fundamental importance'" of the rights at stake [citation], on the basis of the . . . record alone, we do not find a substantial likelihood the juror was biased or that the extraneous information impermissibly influenced her to the defendant's detriment." (*Carpenter*, *supra*, 9 Cal.4th at p. 656.)

The juror misconduct involved juror no. 173, who lived in the Santa Ana neighborhood where the crime occurred. Juror no. 173 testified a person she knew from the neighborhood told juror no. 173 that S.V. was "head of a gang" and "involved with the Mexican Mafia" and drugs. However, any negative information about S.V. that juror no. 173 may or may not have discovered outside this case, is in line with evidence presented at trial. Indeed, the prosecution presented significant information undermining S.V.'s alibi for Ortiz, demonstrating S.V. was deeply involved with gang members and guns. The evidence at trial showed: S.V. knew all three people responsible for Adame's murder; S.V. personally knew Ortiz; S.V. knew Ortiz and Lagunas were members of a gang; the gang expert opined S.V. could only order other gang members to his home if he had the authority to do so (inferring S.V. was the head of a gang); S.V. associated with D.O. and there were pictures of him in his garage with firearms; S.V. owned 50 firearms; and S.V. allegedly knew information helpful to Ortiz, but declined to act until after the preliminary hearing. After reviewing the entire record, we conclude the information received by juror no. 173 was not substantially prejudicial.

Carpenter, *supra*, 9 Cal.4th 634, is instructive. The defendant committed a series of murders in Santa Cruz and Marin counties. (*Id*. at pp. 640-641.) He was found guilty of the Santa Cruz murders and sentenced to the death penalty. The trial for the Marin murders followed. (*Ibid*.) A woman had affirmed that she had not heard of the Santa Cruz murders, and was selected as a juror in the Marin County case. (*Id*. at p. 641.)

However, via a habeas corpus petition, it became clear that the juror was aware the defendant had been convicted of murder in the prior case and sentenced to death. (*Id*. at p. 642.) The court determined the juror committed misconduct by receiving information about the prior case, but concluded she did not reveal this information to the other jurors. (*Id*. at pp. 642-643, 647.) Following the finding of misconduct, the court found the presumption of prejudice had been rebutted. (*Id*. at p. 653-654.) Notably, the court emphasized the information was extraneous, the juror chose to keep the information to herself, rather than revealing it to the other jurors, and it appeared she did not base her verdict on this outside information. (*Id*. at pp. 655-657.)

Similarly, here, the trial court found juror no. 173 committed misconduct by learning information about S.V. and D.O. However, juror no. 173 did not reveal this information to other jurors, and in fact, noted that this information did not affect her verdict. Additionally, there was alternate evidence supporting an inference of S.V.'s gang involvement. So while juror no. 173 committed misconduct, any presumption of prejudice was rebutted and the court's denial of Ortiz's motion for a new trial motion was proper.

VI. *Motion to Unseal*

Ortiz moved to unseal portions of the record on appeal. Specifically, he seeks to make public the testimony of juror no. 173, including: a juror declaration; an investigator declaration; other juror letters; and a court order. Apart from sensitive juror identification information that we ordered removed from these materials pursuant to Code of Civil Procedure section 237 and California Rules of Court, rule 8.332, the sealed portions of the record otherwise contain a routine investigation into juror misconduct and should be available to the public.

We recognize the First Amendment includes a right of public access to criminal trials. (See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1216-1217.) Such access ensures judicial integrity. (*Id.* at p. 1219.)

Public access serves to "(i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding." (*Ibid*.) "If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism." (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 784.)

Because of these important principles, before substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find: "(1) There exists an overriding interest that overcomes the right of public access to the record; [¶] (2) The overriding interest supports sealing the record; [¶] (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; [¶] (4) The proposed sealing is narrowly tailored; and [¶] (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court 2.550 (d).)

In this case, it appears the trial court did not issue a ruling explaining its rationale for sealing the records at issue. The law requires one. "[A] reasoned decision about sealing or unsealing records cannot be made without identifying and weighing the competing interests and concerns. Such a process is impossible without (1) identifying the specific information claimed to be entitled to such treatment; (2) identifying the nature of the harm threatened by disclosure; and (3) identifying and accounting for countervailing considerations." (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 889, 894.) Absent compelling reasons to maintain the sealed records, pretrial and posttrial examination of jurors should be held open to the public. (See *Press-Enterprise Co. v. Superior Court of California* (1984) 464 U.S. 501, 510-511 [pretrial voir dire of potential jurors]; *United States v. Simone* (3d Cir. 1994) 14 F.3d 833, 840 [posttrial hearings to investigate juror misconduct].)

Here, the trial court did not make any express findings identifying an overriding interest overcoming the right of public access to the records. The juror's identifying information is properly redacted throughout the records, thus any concern for juror safety or anonymity is irrelevant. We remand the matter for the trial court to consider Ortiz's request to unseal the redacted juror misconduct materials for public view.

DISPOSITION

The judgment of the trial court is conditionally reversed. We remand the matter to the juvenile court with directions to conduct a transfer hearing pursuant to Welfare and Institutions Code section 707, subdivision (a), no later than 90 days from the filing of the remittitur.

If, at the transfer hearing, the juvenile court determines it would have transferred Ortiz to a court of criminal jurisdiction, then the judgment shall be reinstated as of that date, with the following modifications: Ortiz's sentence applying a 10-year gang enhancement as to count 1 shall be reversed and remanded to the trial court to modify the sentence, striking the 10-year enhancement and imposing a 15-year to life minimum parole eligibility. The court shall transmit the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

If, at the transfer hearing, the juvenile court determines it would not have transferred Ortiz to a court of criminal jurisdiction, then Ortiz's criminal convictions and enhancements will be deemed to be juvenile adjudications as of that date. The juvenile court is then to conduct a dispositional hearing within its usual timeframe.

We remand the matter to the trial court to consider Ortiz's request to unseal the redacted juror misconduct materials for public view. On remand, the court is directed to issue a reasoned decision about sealing or unsealing the records after identifying and weighing the competing interests and concerns.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.